DISTRIBUTED
SEP 27 1990

(2)

No. 90-332

Supreme Court, U.S.
FILED
SEP 24 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

GEORGIA STATE BOARD OF ELECTIONS and MAX CLELAND, Secretary of State and Chairman of the Georgia State Board of Elections,

Appellants,

versus

TYRONE BROOKS, LANETT STANLEY, BILL McKINNEY, JOE BEASLEY, VENUS E. HOLMES, MICHAEL ROBINSON, EDWARD BROWN, REV. DR. WILLIAM HOWELL, JOHN WHITE, MARY YOUNG-CUMMINGS, MARY BLACK, WILLIE MAYS, WILLIAM YOUNG, DEANIE FRAZIER, DIANE HARVEY-JOHNSON, REV. G.L. AVERY, JUANITA T. WILLIAMS, PATRICIA C. JONES, EDITH INGRAM GRANT, HENRY COOK, ANNIE SMITH, AND ERCEL BALDWIN,

Appellees.

On Appeal From The United States District Court For The Southern District Of Georgia

MOTION TO AFFIRM

KATHLEEN L. WILDE
Counsel of Record
LAUGHLIN McDONALD
NEIL BRADLEY
American Civil Liberties Union Foundation, Inc.
44 Forsyth St. NW – Suite 202
Atlanta GA 30303
404/523-2721

Counsel for Appellees.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

STATEMENT OF OBJECT 2

QUESTIONS PRESENTED 2

STATEMENT OF FACTS

Appellants' Statement of Facts 3

Relevant Facts Relied Upon by Appellees on This Motion 6

ARGUMENT

I. The Creation of An Elected Position Is a Covered Change Under Section 5 of the Voting Rights Act 9

II. *Haith v. Martin* Properly Decided The Scope of Section 5 and There Is No Basis for Reconsideration 15

CONCLUSION 17

APPENDIX SUPPLEMENT

H.B. No. 721, To Provide for an Additional Judge of the Superior Court of the Atlanta Judicial Circuit ..... App. 97

TABLE OF AUTHORITIES

Page

CASES:

Allen v. State Board of Elections, 393 U.S. 544 (1969) 11, 12

Berry v. Doles, 438 U.S. 190 (1978) 12

Blanding v. DuBose, 454 U.S. 393 (1982) 10

Chisom v. Edwards, 839 F.2d 1056 (5th Cir.), cert. den., 109 S.Ct. 390 (1988) 16

City of Lockhart v. United States, 460 U.S. 125 (1983) 10, 13

City of Petersburg v. United States, 410 U.S. 962 (1973), affirming 354 F.Supp. 1021 (D.D.C. 1972) 13

City of Pleasant Grove v. United States, 479 U.S. 462 (1987) 10

City of Port Arthur v. United States, 459 U.S. 159 (1982) 10, 14

City of Richmond v. United States, 422 U.S. 358 (1975) 13

City of Rome v. United States, 446 U.S. 156 (1980) 12

Clark v. Roemer, Civ. No. 86-435-A (M.D.La. Aug. 29, 1988) 11, 16, 17

Dougherty County GA Board of Education v. White, 439 U.S. 32 (1978) 11

Georgia v. United States, 411 U.S. 526 (1973) 13

Haith v. Martin, 618 F.Supp. 410 (E.D.N.C. 1985) (3 judge), summarily aff'd, 477 U.S. 901 (1986) ... 7, 10, 15

TABLE OF AUTHORITIES – Continued

Page

Holmes v. Danner, 191 F.Supp. 394 (M.D.Ga. 1961) 4

Kirksey v. Allain, 635 F.Supp. 347 (S.D.Miss. 1986) 16

Kirksey v. Allain, Civ. No. J85-0960(B)(S.D.Miss. April 3, 1986) 11

League of United Latin American Citizens Council v. Clements, 902 F.2d 293 (5th Cir.), en banc granted 902 F.2d 322 (1990)..... 17

Mallory v. Eyrich, 839 F.2d 275 (6th Cir. 1988) 16

Martin v. Allain, 658 F.Supp. 1183 (S.D.Miss. 1987) 17

McCain v. Lybrand, 465 U.S. 236 (1984) 3, 10

Morris v. Gressette, 432 U.S. 491 (1977) 6, 9

NAACP v. Hampton County Election Comm'n, 470 U.S. 166 (1985) 10

Perkins v. Matthews, 400 U.S. 379 (1971).....3, 12

Rogers v. Lodge, 458 U.S. 613 (1982)..... 12

SCLC v. Siegelman, 714 F.Supp. 511 (M.D.Ala. 1989)..... 16

Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975) 4

Ward v. Regents of University System of Georgia, 191 F.Supp. 491 (N.D.Ga. 1957) 4

Williams v. State Board of Elections, 696 F.Supp. 1563 (N.D. Ill. 1988)..... 17

TABLE OF AUTHORITIES – Continued

Page

STATUTES, RULES & REGULATIONS

42 U.S.C. §1971, et seq ("Voting Rights Act")..... 16

42 U.S.C. §1973(b)..... 16

42 U.S.C. §1973c, Section 5 of the Voting Rights Act..... *passim*

28 C.F.R. §51..... 6

28 C.F.R. §51.13.....10, 12

O.C.G.A. §21-2-135..... 7

O.C.G.A. §21-2-284.1..... 7

O.C.G.A. §21-2-285.1..... 7

O.C.G.A. §21-2-501..... 7

OTHER AUTHORITIES

S. Rep. 94-295, 94th Cong., 1st Sess. (1975)..... 13

No. 90-332

In The

Supreme Court of the United States

October Term, 1990

GEORGIA STATE BOARD OF ELECTIONS and MAX CLELAND, Secretary of State and Chairman of the Georgia State Board of Elections,

Appellants,

versus

TYRONE BROOKS, LANETT STANLEY, BILL McKINNEY, JOE BEASLEY, VENUS E. HOLMES, MICHAEL ROBINSON, EDWARD BROWN, REV. DR. WILLIAM HOWELL, JOHN WHITE, MARY YOUNG-CUMMINGS, MARY BLACK, WILLIE MAYS, WILLIAM YOUNG, DEANIE FRAZIER, DIANE HARVEY-JOHNSON, REV. G.L. AVERY, JUANITA T. WILLIAMS, PATRICIA C. JONES, EDITH INGRAM GRANT, HENRY COOK, ANNIE SMITH, AND ERCEL BALDWIN,

Appellees.

On Appeal From The United States District Court For The Southern District Of Georgia

MOTION TO AFFIRM

STATEMENT OF OBJECT

Pursuant to Rule 18.6, Appellees move to affirm the judgment[1] sought to be reviewed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. The decision entered on the merits below is based on well-settled law established by this Court, and there is no conflict which requires this Court's resolution.

QUESTIONS PRESENTED

Appellants set forth three questions for consideration in this appeal. Questions I and III, concerning the scope of Section 5 of the Voting Rights Act (42 U.S.C. §1973c), have already been conclusively answered by this Court, and present no new issue for decision. Question II, alleging that the district court and/or the Attorney General have imposed an "affirmative duty" to change voting practices to "maximize minority voting strength," is not presented by the record below. The district court merely determined that the voting changes had the "potential for discrimination," and therefore required preclearance. The Attorney General's objection (which is not before this Court) was grounded upon a finding that those voting changes would "dilute" or "minimize" black voting strength. No affirmative obligation was imposed upon a

---

[1] Appellees have appealed the remedy portions of the district court's final order. *Brooks v. Georgia State Board of Elections*, No. 90-272. Appellees have no quarrel, however, with the court's resolution of the merits.

covered jurisdiction by either the district court or the Attorney General to "maximize" black voting power.

STATEMENT OF FACTS

Appellants' Statement of Facts

The Statement of Facts, as presented by Appellants in this case, is rife with misleading and erroneous assertions and requires correction.

As a matter of law, the only issues before a three-judge court in a Section 5 proceeding are whether the jurisdiction is covered by the statute; whether the change affects voting; and whether that change has been precleared. *Perkins v. Matthews*, 400 U.S. 379, 383-84 (1971); *McCain v. Lybrand*, 465 U.S. 236 (1984). "[I]t is neither the function nor the prerogative of . . . a three judge court" to determine "whether a covered change does or does not have the purpose or effect 'of denying or abridging the right to vote on account of race or color.' " *Perkins, supra*, 400 U.S. at 384-85.

In accordance with this well-settled law, the district court did not make any determinations concerning whether the statutes themselves, or the method of electing superior court judges, had a racially discriminatory effect. Appellants' assertions that the "undisputed evidence shows that there has been no discrimination in either the election or the appointment of superior court judges in the State of Georgia" (J.S. 7), and that the "lower court did not find . . . that the method of electing superior court judges has somehow discriminated against

black judicial candidates in Georgia" (Id.) are highly misleading. The district court had no authority to make any such findings, nor to engage in an "assessment of Georgia's electoral practices," as Appellants imply (J.S. 8). Such an assessment is the exclusive province of the Attorney General and the District Court for the District of Columbia in preclearance proceedings. Similarly, most of the evidence which Appellants recite in their Statement of Facts which purportedly supports the absence of discrimination is evidence which they presented to the *Department of Justice*, as part of the preclearance process, not to the local district court. The appendix citations (App. 58-76) are to a letter from the State of Georgia to the United States Attorney General, not to findings of the district court.[2] Other "factual" assertions are made totally

---

[2] The facts asserted, such as the percentage of qualified black attorneys who have been appointed or elected to the superior court bench, are themselves irrelevant to the question as to whether the method of election discriminates against black citizens. This is a voting rights case, not an employment discrimination action. It is the right of black voters to elect candidates of their choice – be they black or white – that is being abridged, not the right to black attorneys to become judges.

Further, the statistics, even if relevant, would not demonstrate racial fairness. The paucity of black lawyers in the state with seven years experience is due in large measure to historic discrimination against black citizens by law schools, *Holmes v. Danner*, 191 F.Supp. 394 (M.D.Ga. 1961), *Ward v. Regents of University System of Georgia*, 191 F.Supp. 491 (N.D.Ga. 1957), bar examiners, *Tyler v. Vickery*, 517 F.2d 1089 (5th Cir. 1975), (noting that "black applicants as a class have traditionally experienced particular difficulty in passing the Georgia bar examination," and that "in July 1972 . . . each of the 40 black applicants taking the examination failed") and state and local bar associations.

without citation, and appear nowhere in the record (see, e.g., J.S. 8). What Appellants tout as the "absence of any evidence of discrimination in the election or appointment" of judges (J.S. 8-9) is the product *not* of a racially fair system or fact-finding favorable to the State, but of the recognition, by both Appellees and the district court, of the limited scope of that court's jurisdiction.

Appellants' statements concerning the findings of the Attorney General are also inaccurate. According to Appellants,

> The Department did not find, nor could it have found, that the addition of these judgeships was somehow racially discriminatory, nor did the Department suggest that black voters were in any way disadvantaged by the creation of new judgeships.

(J.S. 9). To the contrary, such findings, stated in the statutory terms of the State having the burden of proof, were the very gravamen of the Section 5 objection. After reviewing all the evidence submitted, the Attorney General concluded that the state had not "carried its burden of showing that the expansion of an electoral system, which includes the restrictive majority vote and designated post features, through the additional judgeships under review here" has "neither a discriminatory purpose nor a discriminatory effect." App. 81.[3]

---

[3] The Attorney General's determination is not before this Court and cannot be reviewed on this appeal. However much Appellants might wish to reargue the racial merits of their judicial election practices, the Attorney General's decision

(Continued on following page)

One further clarification is required. The three-judge court, in its order entered December 1, 1989, did not "direct" the State to complete its submission to the Department of Justice (J.S. 9). Rather, the court, consistent with the limits of its power, gave the State thirty days within which to provide the requested information to the Attorney General, and specified affirmative relief should Defendants fail to seek reconsideration (App. 19-21).

Relevant Facts Relied Upon By Appellees On This Motion

Georgia is a "covered jurisdiction" under the provisions of Section 5 of the Voting Rights Act, 42 U.S.C. §1973(c); 28 C.F.R. §51. Any change in a standard, practice or procedure with respect to voting must therefore be precleared by the Attorney General of the United States or the District Court for the District of Columbia before the change may be lawfully implemented.

(Continued from previous page)

denying Section 5 preclearance is not subject to judicial review. *Morris v. Gressette*, 432 U.S. 491, 504 (1977).

The State has now filed a declaratory judgment action seeking preclearance by the United States District Court for the District of Columbia. It is that judgment, not this, that would present this Court on appeal with the opportunity to review a determination that the State had not carried its burden of demonstrating that the method of electing Georgia's newly created superior court judgeships has neither a discriminatory purpose nor a discriminatory effect. All that is now presented is whether the district court properly determined that the addition of elected judgeships is a covered change under Section 5 of the Voting Rights Act.

Georgia elects its superior court judges. Election is at-large by all electors within the judicial circuit, using numbered posts and a majority vote requirement. O.C.G.A. §§21-2-284.1 and 285.1, §21-2-135 and §21-2-501. There are 45 judicial circuits, ranging in size between one and eight counties. The number of judges elected in each circuit ranges from one to 14. All of the circuits have a majority white voting age population.

Between 1965 and 1988, Georgia enacted statutes creating 77 judgeships of the superior court, as well as five new circuits. Each statute, by its terms, creates the new judicial seat; establishes the date on which the first election for that seat shall be held (often resulting in the staggering of election terms within the circuit); provides for interim appointment by the governor; and creates a new election post to appear on the ballot within the particular judicial circuit. See, e.g., H.B. No. 721, App. 97-99. Thirty-two (32) of the statutes enacted during this period added judges to circuits that, prior to November 1, 1964, were single-member districts, thereby creating multi-member judicial circuits.

Despite the preclearance requirement, Georgia implemented each of these election statutes without first obtaining preclearance. Positions were established, judges were appointed, subsequent elections were conducted, and vacancies were filled, all without complying with Section 5. All of the unprecleared judgeships are now held by incumbents who were appointed or elected after the decision in *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C 1985) (3 judge), *summarily aff'd* 477 U.S. 901 (1986), in which this Court held that changes in the number and manner of election of judges are changes

requiring preclearance under Section 5 of the Voting Rights Act.

It was not until June 27, 1988 that the State submitted any of the judicial election changes for preclearance. Those in areas of the state having few black citizens were precleared, while the Attorney General requested additional information concerning the other changes. At that point the State took the position that changes affecting the election of judges were not covered by Section 5 and refused to send the requested information. The Attorney General entered a Section 5 objection which the Appellees sought to enforce before the three-judge court in this case. The three-judge court ruled that the disputed changes were subject to Section 5 and the State eventually submitted the additional information. However, the Department of Justice objected to the creation of each new judgeship in circuits having a significant black population, on the grounds that the State had not carried its burden of demonstrating that the submitted changes had "neither a discriminatory purpose nor a discriminatory effect." (App. 81).

In 1989 and 1990, the Georgia General Assembly created eleven additional judgeships. Implementation of 10 of those 11 judgeships has been enjoined by the three-judge court, together with any further elections for those unprecleared judicial posts that had already been implemented.

ARGUMENT

I. The Creation of An Elected Position Is A Covered Change Under Section 5 of the Voting Rights Act

The issue presented by this appeal is simple and straightforward: did the three-judge district court correctly conclude that the creation of additional elected judgeships is a change covered by Section 5 of the Voting Rights Act, 42 U.S.C. §1973c? This case does not, as the State contends, involve review of the standards used by the Department of Justice in denying preclearance. (J.S. 10, 13). As noted previously, the merits of the Attorney General's decision is not before the Court. Further, the Court has made it clear that Section 5 decisions of the Attorney General, as opposed to those of the District Court for the District of Columbia, are not subject to judicial review. *Morris v. Gressette*, 432 U.S. 491 (1977). Nor does this case involve the "roving, plenary power to review, enjoin, or modify every election practice that might exist in covered jurisdictions" (J.S. 17), nor does it "affirmatively mandate new electoral practices." (J.S. 18). The *only* voting changes found by the district court to be subject to Section 5 (and the *only* voting changes objected to by the Attorney General) were the creation of additional elected judgeships. No other voting practice of the State has been ordered to be submitted for Section 5 review, enjoined or modified in any way, including the State's general majority vote and numbered post requirements, and no new electoral practices have been mandated. The State has merely been ordered by the district court to comply with Section 5. The efforts of the State to present this case as something that it is not are unavailing.

The decision of the district court, finding that the addition of elected judgeships to existing superior court circuits required preclearance, was fully consistent with settled law.[4] This Court has repeatedly held in similar cases that the addition of elected officials to existing public bodies requires Section 5 preclearance. *City of Port Arthur v. United States*, 459 U.S. 159 (1982) (expansion in the size of a city council requires preclearance); *City of Lockhart v. United States*, 460 U.S. 125 (1983) (addition of two seats to a local governing body is a "covered change"); *McCain v. Lybrand*, 465 U.S. 236 (1984) (increase in number of council members is a covered change).

More specifically, this Court, as well as every court which has considered the question, has held that the creation of additional judgeships, including the addition of judges to existing circuits, is covered by Section 5 without regard to the fact that the additional judges would be elected under preexisting state procedures. *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985), *aff'd*, 477 U.S. 901 (1986) (enjoining, *inter alia*, the enforcement of Chapter 1109, Session Laws of 1983, creating additional judgeships in four circuits whose existence predated the

---

[4] It would be a complete anomaly, contrary to logic as well as precedent, to hold that changes such as the moving of a polling place, 28 C.F.R. §51.13(d), or the annexation of vacant land, *City of Pleasant Grove v. United States*, 497 U.S. 462 (1987), or the rescheduling of a candidate qualifying period, *NAACP v. Hampton County Election Commission*, 470 U.S. 166, 176, 178 (1985) were changes affecting voting, but that the creation of 48 entirely new elected offices was not. *See, Blanding v. DuBose*, 454 U.S. 393 (1982) and *McCain v. Lybrand, supra*, applying Section 5 to the creation of elected offices from appointed positions.

Voting Rights Act); *Clark v. Roemer*, Civ. No. 86-435-A (M.D.La Aug. 29, 1988) (enjoining, *inter alia*, the enforcement of "Act 801 of 1987 which created one additional judgeship for the Second Circuit Court of Appeal and three additional judgeships for the Third Circuit Court of Appeal"); *Kirksey v. Allain*, Civ. No. J85-0960(B) (S.D.Miss. April 3, 1986) (enjoining operation of 30 statutory enactments which merely added new judgeships to multimember circuits having a pre-existing practice of numbered posts, majority vote and circuit-wide voting).

Section 5 of the Voting Rights Act requires that *any* change in a "standard, practice or procedure with respect to voting" be precleared, by the Attorney General or the United States District Court for the District of Columbia, prior to its implementation. 42 U.S.C. §1973c. Congress intended for Section 5 to reach "any state enactment which altered the election law of a covered State in even a minor way." *Dougherty County, GA Board of Education v. White*, 439 U.S. 32, 37 (1978). Section 5 is to be given the "broadest possible scope," reaching "all changes, no matter how small." *Allen v. State Board of Elections*, 393 U.S. 544, 566-568 (1969).

The creation of additional superior court judgeships is unqestionably a voting change within the meaning of Section 5. By increasing the number of judicial seats within existing judicial circuits, the State of Georgia has created new electoral offices for which voters may cast ballots, and it has established additional seats from which judicial candidates may choose in deciding to run for office. Voters are affected because they will have additional candidates from which to choose. Prospective candidates are affected because the creation of an additional

judgeship may mean that a challenger will not have to face a long-time incumbent.

Moreover, the judicial statutes in question do not merely increase the number of elected judgeships within the State. They also create staggered terms of office, and implement (in many cases) new systems of multi-member district elections. Each of these features itself renders the statutes "covered changes" under established law.

Staggered terms limit the number of seats to be filled at any given election by having positions expire in different years, and have long been held subject to preclearance. *City of Rome v. United States*, 446 U.S. 156, 185 (1980); *Berry v. Doles*, 438 U.S. 190 (1978). *See also* 28 C.F.R. §51.13, listing "staggering the terms of office" as an example of a covered voting change.

Changes from district to at-large elections also fall squarely within the scope of Section 5. *Allen v. State Board of Elections*, 393 U.S. 544, 566-67 (1969); *Perkins v. Matthews*, 400 U.S. 379, 387-90 (1971); *Rogers v. Lodge*, 458 U.S. 613, 616 (1982) ("At-large voting schemes and multi-member districts tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district.") *See also*, 28 C.F.R. §51.13(e), giving as an example of a covered voting change "changing to at-large elections from district elections." The judicial election statutes at issue in this case implemented new systems of multi-member district elections in twenty-four (24) circuits, by adding judgeships to circuits in which the judge was previously elected from a single-member circuit.

That the voting changes at issue were implemented in the context of pre-existing voting procedures such as a majority vote requirement or circuit-wide elections does not remove them from the scope of Section 5. Rather, Section 5 requires that the entire procedure for election of judges be subjected to review. S. Rep. 94-295, 94th Cong., 1st Sess. 19 (1975) ("In some Section 5 cases, a change in the voting practice or procedure may also retain some features of the previous system, and all aspects of such a change are within the reach of Section 5.") More relevant to this proceeding, the local three-judge court is similarly required to consider the context in which a change will be implemented to determine if it has the potential for discrimination. Any other rule would require a court enforcing Section 5 to behave like an ostrich and to ignore "the reality of changed practices as they affect Negro voters," *Georgia v. United States*, 411 U.S. 526, 531 (1973), which this Court has expressly directed it to consider.

It is well-settled that the Attorney General, in assessing the purpose or effect or a voting change under Section 5, must examine the change in the *context* of other, pre-existing voting procedures. *See City of Richmond v. United States*, 422 U.S. 358 (1975); *City of Petersburg v. United States*, 410 U.S. 962 (1973) [affirming 354 F.Supp. 1021 (DDC 1972)]. Appellants' argument that the Attorney General (or District Court for the District of Columbia) has no authority to do so has already been squarely considered and rejected by this Court. In *City of Lockhart v. United States*, 460 U.S. 125 (1983), the city government had previously consisted of a mayor and two commissioners, elected at-large using numbered posts. Both the at-large and numbered post features were permissible,

pre-existing practices, just as the majority vote requirement, circuit-wide elections, and numbered posts in the instant case. In 1973, two additional seats were added to the council, and terms were staggered. The city, like Appellants here, argued that the continued use of numbered posts could not be scrutinized under Section 5. This Court soundly rejected that position, explaining:

> In moving from a three-member commission to a five-member council, Lockhart has changed the nature of the seats at issue. Council posts one and two are not identical to old commission posts one and two. For example, they now constitute only 40% of the council, rather than 67% of the commission. Moreover, one cannot view these seats in isolation, for they are an integral part of the council. The possible discriminatory purpose or effect of the new seats, admittedly subject to §5, cannot be determined in isolation from the "pre-existing" elements of the council. Similarly, the numbered-post system is an integral part of the new election plan. The impact of any of the seats cannot be evaluated without considering the fact that they are all filled in elections using numbered posts. We therefore hold that the entire system introduced in the 1973 charter is subject to preclearance.

460 U.S. at 131-32. *See also City of Port Arthur v. United States*, 459 U.S. 159, 162 (1982) (denying preclearance to an expansion in the size of a city council, although the city continued to use pre-existing at-large voting and a majority vote requirement for the added seats).

Contrary to Appellants' assertion, such a procedure is not an unending "re-review" of previously approved methods of election. The Attorney General does not – and cannot – invalidate pre-existing or precleared procedures,

such as Georgia's majority vote requirement. He merely evaluates the effect of the new change in the context in which it will be implemented, to determine whether the change before him should be precleared. By the same token, a local three-judge court in enforcing Section 5 must consider the context in which a voting change will be implemented to determine its potential for discrimination.

There can be no doubt that the question which Appellants seek to present has been decisively and conclusively resolved by this Court on numerous occasions, and that no purpose would be served by full briefing and argument.

II. *HAITH v. MARTIN* PROPERLY DECIDED THE SCOPE OF SECTION 5 AND THERE IS NO BASIS FOR RECONSIDERATION

Section 5 of the Voting Rights Act requires preclearance of "*any* voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." 42 U.S.C. §1973c. There is absolutely no basis, in either the language of 42 U.S.C. § 1973c or its legislative history, for concluding that changes affecting the election of judges should be treated any differently than any other voting change. This Court, in affirming the district court's decision in *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985), merely underscored the obvious.

There has been no "resulting confusion" either in the state legislatures or in any Federal court concerning the application of Section 5 to judicial elections. Every court

which has considered the question has followed this Court's summary affirmance, and required Section 5 compliance. *Kirksey v. Allain*, 635 F.Supp. 347 (S.D.Miss. 1986) (three-judge court); *Clark v. Roemer*, Civ. No. 86-345-A (M.D.La. 1988); *Brooks v. State Board of Elections*, Civil Action No. CV288-146 (S.D.Ga. Dec. 1. 1989).

The only "confusion" is that which the State itself is attempting to create, by merging arguments concerning the scope of Section 2 of the Voting Rights Act with its discussion of the proper scope of Section 5.[5] Whether judicial election procedures are exempt under Section 2 of the Voting rights Act, 42 U.S.C. § 1971, et seq., is a wholly different question from whether judicial voting changes are "covered" under Section 5, and is not presented by this appeal.[6]

---

[5] Section 2, unlike Section 5, contains the word "representative." A violation of Section 2 is established if members of a protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). Defendants in Section 2 cases have therefore argued – without success – that since judges are not "representatives," Section 2 of the Voting Rights Act has no application to judicial elections. No such argument is available under Section 5.

[6] Appellees would point out, however, that even as to the proper scope of Section 2 of the Voting Rights Act there is no confusion among the courts. Every court which has had the last word on the question has concluded that Section 2 *does* apply to judicial elections. See, e.g. *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir.), *cert. den.* 109 S.Ct. 390 (1988); *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988); *SCLC v. Siegelman*, 714 F.Supp. 511

(Continued on following page)

CONCLUSION

For the foregoing reasons, the judgment below, holding that the addition of elected judgeships to Georgia's superior court are covered changes requiring Section 5 preclearance, should be affirmed.

Respectfully submitted,

KATHLEEN L. WILDE
(Counsel of Record)
LAUGHLIN MCDONALD
NEIL BRADLEY
American Civil Liberties
Union Foundation, Inc.
44 Forsyth St NW - Suite 202
Atlanta GA 30303
(404) 523-2721
Attorneys for Appellees

(Continued from previous page)

(M.D.Ala. 1989); *Clark v. Roemer*, No. 86-435-A (M.D.La. 1988); *Williams v. State Board of Elections*, 696 F.Supp. 1563 (N.D.Ill. 1988); *Martin v. Allain*, 658 F.Supp. 1183 (S.D. Miss. 1987) The only opinion holding that there are any limits on Section 2's application to judicial elections is *League of United Latin American Citizens Council v. Clements*, 902 F.2d 293 (5th Cir. 1990), cited by Appellants. That panel opinion, which created an exception for *trial* judges, was *vacated* by the full 5th Circuit *sua sponte*, and has absolutely no precedential value. *Id.*, at 902 F.2d 322.

A BILL TO BE ENTITLED

AN ACT

To provide for an additional judge of the superior court of the Atlanta Judicial Circuit; to provide for the initial appointment and subsequent election of such judge and of his successors; to provide for terms; to prescribe the powers of said judge; to prescribe the compensation and allowances of said judge; to amend Code Section 15-6-2 of the Official Code of Georgia Annotated, relating to the number of superior court judges for each of the judicial circuits, so as to provide an additional judge of the superior court of the Atlanta Judicial Circuit; to provide a conditional effective date; to repeal conflicting laws; and for other purposes.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

Section 1. Code Section 15-6-2 of the Official Code of Georgia Annotated, relating to the number of superior court judges for each of the judicial circuits, is amended by striking paragraph (3) of said Code Section in its entirety and inserting in lieu thereof a new paragraph (3) to read as follows:

"(3) Atlanta Circuit.....13"

Section 2. A new judge of the superior court is added to the Atlanta Judicial Circuit, thereby increasing to 13 the number of judges of said circuit.

Section 3. The initial judge appointed by this Act shall be appointed by the Governor for a term beginning July 1, 1989 and expiring December 31, 1990, and until a successor is elected and qualified. A successor to the

initial judge shall be elected in a manner provided by law for the election of judges of the superior courts of this state at the general election in November, 1990 for a term of four years beginning on January 1, 1991, and until the election and qualification of a successor. Future successors shall be elected at the general election each four years thereafter for terms of four years and until the election and qualification of a successor. They shall take office on the first day of January following the date of the election. Such election shall be held and conducted in a manner provided by law for the election of judges of the superior courts of this state.

Section 4. Said additional judge shall have and may exercise all powers, duties, dignity, jurisdiction, privileges, and immunities of the present judges of the superior courts of this state. Any of the 13 judges of the superior court of said circuit may preside over any case therein and perform any official act as judge thereof.

Section 5. The compensation, salary, and contingent expense allowance of said additional judge shall be the same as that of the other judges of the superior court of the Atlanta Judicial Circuit. Any salary supplements heretofore enacted by the county of said circuit shall also be applicable to the additional judge provided for in this Act.

Section 6. This Act shall become effective only if specifically funded and, if so funded, this Act shall become effective upon the later of: (1) its approval by the Governor or its becoming law without his approval; and (2) the enactment into law of legislation appropriating funds specifically designated in the act appropriating the

same as being for the purpose of funding the additional judgeship provided for in this Act.

Section 7. All laws and parts of laws in conflict with this Act are repealed.